

Antitrust Immunities and Exemptions

Statement

Prepared for the December 1, 2005 Hearing of the
Antitrust Modernization Commission

Submitted by

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Introduction

I am honored to be asked to participate in this hearing on the very important questions concerning the appropriate analysis and scope of exemptions and immunities from antitrust law. A major theme in my scholarship over the last three decades has been the interaction between our fundamental national policy in favor of competition and the continuing efforts to blunt that policy by statutory or judicial exemptions. Recently, I have joined with a group of scholars to prepare a book that examines competition and merger policy in a number of the formerly regulated industries. In addition, I am co-chairing a drafting committee that is preparing a monograph for the Antitrust Section of the ABA concerning statutory exemptions from and modifications of antitrust law. Although these comments will draw in part on what I have learned as a result of my participation in these projects, these comments reflect only my views and do not in any way represent the views of the Antitrust Section or my collaborators on the book project. I have attached copies of the tentative table of contents of both projects (Appendices A and B) to give you a better sense of their scope and nature.

The AMC has asked for comments on the proposed framework for evaluating exemptions that Darren Bush, Gregory Leonard and Stephen Ross developed as consultants to the AMC. In addition, that notice requested comments on three other general topics as well as asking for comments on specific exemptions with particular focus on eight exemptions.¹

The first part of this statement addresses the proposed framework for evaluating exemptions. The second part addresses several general issues which I suggest the AMC should consider in evaluating statutory exemptions from or modifications of antitrust law. The third

¹ On July 15, 2005, I filed comments with the AMC responsive to that notice and will in part reiterate some of those observations in this statement.

part offers my overview of the state of statutory exemptions and the process of deregulation. The final part offers comments specific to particular exemptions and clusters of exemptions.

I. The Proposed Framework—Good in General but Potentially Misdirected in Specifics

I applaud the general framework that the consultants propose for Congress to use in examining suggested statutory exemptions and reviewing those that it has created. That framework focuses on the costs and benefits that all stakeholders will face as a result of the grant of an immunity from or modification of antitrust law. It also recommends imposing on the proponents of an exemption the obligation of carrying the burden of proof that an exemption is justified. This is an important criterion.

In general Congress should be skeptical of any request for statutory exemptions from antitrust law. It has not developed the capacity to engage in the kind of fine grained analysis of complex legal and factual questions necessary to resolve the merits of such requests. It is ironic, at least, that Congress requires administrative agencies to conduct detailed analysis of the problem to be remedied, the available alternatives, and the likely costs and benefits of choosing each alternative before adopting regulations. Yet Congress, itself, grants exemptions from antitrust that legalize otherwise unlawful exploitative and exclusionary conduct without any comparable review of the projected costs or benefits of such statutes. It would be heartening if Congress were to adopt procedures that would generate a thoughtful review of the purported problem, an analysis of options and some estimate of the expected gains and losses to the economy that would result from the adoption of different options.

If Congress were to employ this model, it would substantially improve the process of evaluating both existing and proposed statutes that modify antitrust or create an exemption.

Unfortunately, as the model itself recognizes, ultimately, Congress must weigh a variety of political considerations in balancing the public interest in competition and constituent as well as contributory enthusiasm for an exemption. Hence, it may be difficult in practice for Congress to impose on itself a process that would necessarily discourage most exemptions from antitrust law.

Despite my skepticism about the political process, the AMC should urge on Congress the need for self-restraint and the merits of requiring some version of the cost benefit model suggested by the consultants. One of the best political defenses to demands is that the proposal must be subject to a process that is likely to expose its weaknesses. Hence, the elected official can ask the advocate to come up with stronger evidence to support the requested action on the basis that otherwise it will be impossible to get it through the process.

Although I am enthusiastic about the overall approach of the Framework that the consultants have proposed, I have two substantial concerns.

A. The Problem of Buyer Power

First, the Framework emphasizes consumer welfare, narrowly defined as gains or losses to the ultimate consumer, as the fundamental concern in evaluating the impact of exemptions. I respectfully disagree. Buyer power is a major, but largely unexamined, issue in our economy. Such power affects the producer side of the economy and need not have any effect on the consumer side. In some instances, when facilitation of workable competition is not feasible, there can be a reasonable basis to authorize producer organizations that might well violate antitrust law absent an exemption. My concern is that the framework does not adequately account for that potential justification.

The AMC initially had included that substantive issue of buyer power on its agenda of

topics for consideration. Regrettably, it ultimately decided not to take up that topic. This is unfortunate because buyer power is both pervasive in our economy and may well result in both positive and negative effects on efficiency and overall welfare. It would be very helpful to courts and legislatures if there was more sustained examination of the economic effects of buyer power and the appropriate criteria for its evaluation throughout the range of antitrust issues where it can arise.

As in the case of seller power, the first best option when a market is the subject of significant buyer power having adverse effects is to reconstitute the market to limit or eliminate the incentives and ability of the buyer to abuse its power. Essentially, this is law that facilitates the efficient functioning of markets. Too often, this important function of the legal system as the means of constituting efficient and socially desirable market contexts is overlooked. Appropriate legal frameworks for markets include easy access, multiple buyers/sellers, and efficient as well as open means of transacting. Such market facilitating regulation is the hallmark of securities and commodities markets where detailed regulation serve to enhance the efficiency of the market.

Where such market facilitation is not feasible, it may make sense from a standpoint of long run economic efficiency to allow sellers to create various kinds of bargaining units that confer on them some countervailing power and so offset the buyer power. Such collectives are not necessarily joint ventures of a sort that would or should pass muster under the antitrust laws. As such they require an exemption to legalize their existence. The goal is not to undermine the fundamental competitiveness of the market process as whole, but to ensure that there is a sufficient balance between buyers and sellers to produce an equitable distribution of the values

being created. The relevant economic concept is Ricardian rents—the advantage accruing to the infra-marginal producer as a consequence of that producers lower costs of production.² A powerful buyer can take that gain away from the producer and force it to operate at a breakeven point. This in turn diminishes the incentives of such a producer to invest in its business and discourages new entry. Overtime, these dynamic harms can result in the stultification of economic growth and innovation in sectors subject to such buyer power.

Economic theory teaches that even if a firm is in a purely competitive downstream market it may have buyer power in the upstream supply market if, for example, producers are numerous but have few outlets for their products that are readily accessible.

The two most prominent areas in which buyer power is a potential problem are agricultural commodity markets and labor markets. In these markets, buyers can exercise substantial power that permits a variety of strategic actions that appropriate producer and perhaps even more troubling can permit a variety of discriminatory and strategic actions that both disadvantage the seller and entrench the ongoing market dominance of the buyer as a buyer. In such market contexts laws that authorize sellers to organize into groups to bargain with buyers have positive effects on the allocation of producer surplus among the groups that jointly produce this value and can reduce or eliminate problems of exploitation of such power and is discriminatory use. Moreover, provided the antitrust laws maintain the downstream market as a competitive one, the ultimate consumer will not suffer any appreciable loss of welfare.

The specific exemptions that come to mind are those authorizing the collective bargaining in labor contexts and the Capper-Volstead authorization of farm cooperatives including those that act solely as bargaining agents for producers. I am not suggesting that the

² See, Roger Noll, “Buyer Power” and Economic Policy, 72 *Antitrust L. J.* 589, 592-594 (2005)

current legal situation is optimal. Indeed, as I shall say later, in the context of agricultural markets there are serious and unjustified efficiency costs associated with the current legal regime in at least a few important markets, notably dairy products. Rather, the point is that in doing a comprehensive cost benefit analysis, it is important to consider the potential positive contributions to producer welfare that may arise from exemptions where buyer power is a major problem and where it is not feasible to facilitate a more workably competitive market context.

To be more concrete about agricultural markets, two examples may illustrate the need for taking into account more explicitly gains to producers in buyer power contexts. First, farmer cooperatives in the grain business allow farmers to avoid the buyer power of privately owned local grain elevators. Such cooperatives often imposed on their members a requirement that the member deal with the elevator only or pay a penalty if the member sold to another buyer. Such restraints because of the localized markets are vulnerable to antitrust challenge even though they are important tools in dealing with opportunistic and strategic threats to the cooperative organization. An exemption for the agreements between cooperatives and their members ensures the integrity of these agreements.³

The second example involves a pure bargaining cooperative representing producers in a region where there are few buyers, but the buyers resell into a competitive market. In such a context, the buyer has an incentive to bargain with each seller and set a price at the sellers margin cost on an all or nothing basis. This compels the seller to yield all its rents to the buyer. However, if sellers can act collectively to bargain a price, they can get price that approximates what would have come in a competitive market. They can not get more because the

³ See, Peter Carstensen, The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis, 15 *Research in Law and Economics* 1, 28-29 (1992).

competitiveness of the resale market constrains the buyer. In addition, and equally important, the buyer facing an organized group of sellers can not discriminate among sellers.⁴ Such seller organizations are indistinguishable from cartels, but in this context can serve important functions in offsetting buyer power.

B. The Framework Maybe Overly Inclusive with Respect to Exemptions

The many of illustrations used in the Framework involve collaborative productive activity among firms and so do not involve the kind of conduct that in fact raises, under modern antitrust standards, a serious concern for illegality. If the restraint is reasonably related to the legitimate needs of the parties to the venture, it will be lawful. It is true that antitrust law is more ambiguous in its analysis than many business people would like, but there is also wide spread resistance to per se rules. Rather than seeking statutory exemptions the business community could make more extensive use of the business review clearance process of the Antitrust Division and the analogous system at the FTC. This would in fact ensure fuller development of antitrust standards and provide a check against excessive and unnecessary restraints on competition.

There are transaction costs involved in both seeking such a clearance and in defending any subsequent private litigation. But mere transaction cost concerns ought not to be the basis for ad hoc exemptions from antitrust law. If a stronger version of the business review clearance process would be desirable including greater transparency, then the focus properly should be on how to reduce the costs and litigation risks associated with legitimate collaboration among competitors rather than developing a framework to determine whether some class of restraints

⁴ See, e.g., *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods*, 497 F.2d. 203 (9th Cir. 1974) cert. denied 419 U.S. 999.

should be exempt from antitrust law.

My suggestion is that the framework ought more carefully to have delineated the kinds of conduct that might require an exemption in the first place. This is the starting place for an inquiry whether an exemption is necessary. No elaborate cost benefit analysis is required if the simple answer is that the potential agreements can be in themselves lawful if they are reasonable.

Using that standard there are, in my view, three contexts in which there are real risks of antitrust liability in the absence of an exemption. The first case involves efforts among firms to define or “regulate” the terms of competition among themselves. Such conduct is functionally indistinguishable from a cartel. The argument for private regulation of competitive conditions is that it may be more efficient and informed than public regulation. It is for this reason that the recent legislation on standard setting has some arguable validity.⁵ It is significant in that statute, Congress appreciated the risks of such conduct and so limited its modification of antitrust law to the elimination of treble damages for registered standard setting organizations (ones fitting certain prescribed criteria for participation and operation) but left the participating members at risk of such liability.

The second area where exemptions are arguably needed is in context of certain kinds of information exchanges. The primary example is in liability insurance where pooling data with forward looking, shared estimates of losses provides important information for market participants. Because of the forward looking character of some of the pooled information, there is a real risk that this activity might be regarded as a form of indirect price fixing among competitors. Hence, if the data pooling is valuable because of its efficiency enhancing character, it may facilitate that activity to provide a carefully crafted exemption to ensure the active

⁵ Standards Development Organization Advancements Act, amending 15 USC 4301 et seq.

cooperation of the industry. Once again, there is a major difference between the current insurance exemption from antitrust and kind of narrowly crafted exemption that efficient market operation might suggest.

Third, some mergers and joint ventures may well be unlawful as a matter of conventional merger law, but desirable for some other policy reason. There are in the area of transportation a number of these exemptions in addition to the one protecting newspaper joint ventures. Once again, there is a possible argument for allowing such combinations where, as in the railroad industry, Congress wanted to have a major restructuring of the industry overseen by a single agency. In addition, Congress may want to devote monopoly profits from a market to providing some specific service to that market that might not otherwise be provided. The newspaper joint venture authorization is an example. It is worth noting that whenever Congress has sought to exempt mergers or joint ventures of this sort, it has imposed some agency review of the transaction. Unfortunately, it has not always crafted that oversight in ways that make it effective.

The concern I want to highlight here is that the open-ended nature of the framework's examples invite consideration of exemptions that do not involve one of these three types of anticompetitive activity, but rather involve conduct that would be lawful under ordinary antitrust law. The Framework does call for evidence that the conduct would otherwise violate antitrust law, but it fails to identify the limited classes of cases where such a conclusion is warranted. As a result it implies broader scope to potential exemptions than is consistent with the maintenance of a competitive economy.

II. Additional Comments on the Statutory Exemptions in General

There are three addition issues that I believe the AMC should consider in its

overall evaluation of statutory exemptions: general sunset provisions for exemptions; better organization of the statutes themselves; and a general standard for construing such statutes.

A. Sunset Provisions

It would be very helpful to the critical analysis of existing exemptions if Congress were to adopt a general sunset provision requiring reconsideration and re-adoption of exemptions on a regular basis. Antitrust decrees are now generally limited to 10 years or less exactly because of the recognition that the conditions of markets change over time.⁶ Exemptive legislation like antitrust decrees should be reconsidered regularly. There are counter arguments against having a pervasive sunset requirement. Such a provision may make it easier for Congress to adopt such legislation on the pretense that it will be reconsidered in 5 or 10 years. In fact, it may be hard to get it removed from the books if it provides clear economic advantages to interest groups.

In looking at the statutes listed in the notice, some important distinctions exist. First, some exemptions are part of a program where an agency is charged with administering the market. But in other instances, the statute exists without connection to an agency. In the first instance, rather than a sunset provision Congress could give the agency a clearly defined goal of maximizing the role of the market and competition in the operation of the industry and confer on it the discretion to modify or terminate the exemption if it ceases to serve the public interest goals that Congress initially identified. Classic examples of such agency reform include the success of the Securities and Exchange Commission in eliminating fixed commission rates for

⁶As a young lawyer in the Antitrust Division, in the late 1960s, I had the task of reviewing a pervasive injunction governing the meat packing industry entered in 1920. That decree both governed and seriously inhibited the established firms. Sadly, my supervisors rejected even my modest suggestions for modification. The dead hand of the past continued to govern those firms well into the 1970s by which time many no longer existed and the rest had so declined that no rational basis existed to continue the decree.

securities traders. The Federal Energy Regulatory Commission successfully reorganized the natural gas industry, and has an ongoing effort to reform electric power. The gas and electricity cases illustrate the problems that arise when the agency seeking to move toward a workably competitive market lacks full authority to revise the regulations governing markets to facilitate desirable competition. Where agencies have authority to set the rules for a market, Congress should give that agency the clear goal of limiting direct regulation while increasing reliance on market institutions as well as more authority to terminate or limit any exemption.⁷

In contrast to exemptions that are part of an agency's regulatory process, other exemptions are free standing without any oversight of the operation of the exemption. For example, the recent medical resident matching exemption (15 USC 37b) assumes that the present system of matching will remain optimal for the indefinite future. Its premise is that neither resident programs nor medical school graduates seeking residencies will be able to manipulate the program in undesirable ways. Moreover, it assumes that this specific method of assigning medical residencies will remain the preferred method for the indefinite future. No agency has authority to oversee the matching program, modify its terms, or limit the scope of exemption in the event of changed circumstances.

These free-standing durable exemptions may not serve the socially desirable goal that Congress imagined, or with changed circumstances, they may have created unintended and undesirable consequences. Sunset provisions with a strict termination date requiring that both

⁷ A further refinement would require that every transaction or activity for which the parties want an exemption should be notified to the agency and subject to review and express authorization. This is a feature of some, but not all, exemption provisions; it has the virtue of putting specifics out in public and allowing all stakeholders to have an opportunity to comment on the merits of the conduct to be exempted. This requirement can only operate where an agency has authority over the underlying industry and is given the power to grant or withhold the exemption.

houses of Congress and the President must approve renewal would have significant utility here.⁸

Another important distinction among the statutory exemptions listed in the notice is that some have continued relevance and others have no utility. It is important to remove the latter statutes from the U.S. Code. A number of exemptions on the AMC's list fall in this category including the Fishermen's Collective Marketing Act, the Anti-Hog-Cholera Serum and Hog-Cholera Virus Act, and Defense Production Act. Periodic review of some sort would ensure that these useless exemptions are removed from the books so that they can not be employed in some unintended way.

B. The Need for Consistent and Strict Construction of Exemptions

As the FTC report on state action has noted, the courts have in general not done a good job of construing exemptions. The need is for a consistent and critical interpretation that recognizes that competition is the fundamental policy and so exceptions should not exceed what Congress has granted.⁹ Two strategies, one judicial and one legislative, might facilitate a more rigorous approach to such statutes.

Judge Easterbrook has said of exemptions:

. . . [Such] legislation [is] a single-industry exception to a law designed for the protection of the public. When special interests claim that they have obtained favors from Congress,

⁸An alternative strategy worth considering would be to charge the Federal Trade Commission with overseeing all exemptions not expressly linked to an administrative agency, and conferring on the FTC the power to terminate the exemption after a period of years, e.g. 10 years, if it finds that the exemption has not or is no longer serving its stated goals. This would leave Congress with the opportunity to re-enact the exemption, perhaps in modified form.

⁹A study of the Local Government Antitrust Act has highlighted this problem. E. Thomas Sullivan, *Antitrust Regulation of Land Use: Federalism's Triumph Over Competition, the Last Fifty Years*, 3 *Wash. U.J.L & Pol'y*, 473 (2000)(courts tend to grant general exemptions for local government even though the statute only provides for a limit on damages).

a court should ask to see the bill of sale. Special interest laws do not have “spirits,” and it is inappropriate to extend them to achieve more of the objective the lobbyists wanted. . . . What the industry obtained, the courts enforce; what it did not obtain from the legislature—even if similar to something within the exception—a court should not bestow. . . . Recognition that special interest legislation enshrines results rather than principles is why courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades. *Chicago Professional Sports v. National Basketball Association*, 961 F.2d 667, 671-672 (7th Cir. 1992).

If courts adopted this approach and construed all exemptions against the beneficiaries, it could pressure Congress to be clearer in drafting such statutes and would restrict their more expansive interpretation. Absent a definitive Supreme Court opinion adopting this standard, however, it is unlikely that the dispersed federal court system would uniformly come to this view of exemptions even if the AMC were to urge that.

Second, the AMC should consider recommending that Congress adopt a statutory rule of construction similar to that adopted in Wisconsin or Connecticut. The Wisconsin antitrust statute provides:

It is the intent of the legislature to make competition the fundamental economic policy of this state and, to that end, state regulatory agencies shall regard the public interest as requiring the preservation and promotion of the maximum level of competition in any regulated industry consistent with the other public interest goals established by the legislature. Wi. Stat. 133.01.

The Wisconsin Supreme Court has relied on this provision to impose strict limits on expansive claims to pre-empt competition.¹⁰ Connecticut’s legislature employed a different statutory

¹⁰*American Medical Transport v. Curtis-Universal*, 154 W2d 135, 452 NW2d 575 (1990)(state antitrust law applies to an unauthorized ambulance service market allocation scheme adopted by the City of Milwaukee); see also, *Cedarhurst Air Charter v. Waukesha County*, 110 F. Supp. 2d 891 (E.D. Wis. 2000)(133.01 applied to reject state action immunity claim in a case involving

strategy. Its statute declares: that the state’s antitrust law will not apply only if the “activity is specifically directed or required by a statute of this state, or of the United States.” Conn. G.S.A. sec. 35-31(b). The Connecticut Supreme Court recently relied on this provision to deny immunity to two municipal water utilities that were accused of conspiring to monopolize the wholesale water supply in a region of that state.¹¹

Adoption of either of these statutory standards would help to ensure that the federal courts in reviewing claims of exemption will employ Judge Easterbrook’s standard.

C. Consolidating Exemptions within the U.S. Code

Currently, statutory exemptions are scattered throughout the U.S. Code. There is no central listing of these provisions. The AMC is to be commended for collecting what may well be the first definitive list of such provisions. I would suggest that the AMC advocate that the revisor of statutes be instructed to collect all exemptions into a single place in the code or at least provide a comprehensive cross listing of exemptions.¹² Such a listing would highlight the apparently random nature of the statutory process. More importantly, it would allow legislators wishing to propose exemptions to have easy access to examples of different exemptions with a variety of terms. For example the small business administration act exemption (15 USC 638(d), 640) provides an interesting dual approval system as well as a method of termination for exemptions that no longer serve the public interest. Other exemptive statutes provide for time limited grants of exemptions that can only be extended after re-application to the granting authority.

airport authority exclusion of competition from the market for airport ground services).

¹¹ *Miller’s Pond Co. v. City of New London*, 273 Conn. 786, 873 A.2d 965 (2005).

¹²The authors of the Framework have made a similar recommendation.

III. Statutory Exemptions on Their Merits in General

Based on the two projects that I am currently involved in have lead me to three fundamental conclusions.

First, the case studies on deregulated industries have convinced me that despite whatever problems exist as a result of incomplete deregulation and sometimes a lack of an appropriate market facilitating legal context, nevertheless, the overall effect to eliminating regulation has been very positive in general for efficiency and consumer gains. Thus, minimizing direct regulation and subjecting markets to the general rules of antitrust generally serves the public interest. It is important to reiterate this simple truth because too often there is a suggestion that competition and the market process stands in the way of efficiency and technological innovation.

Second, based on the case studies of specific exemptions done for the monograph, it is my conclusion that only two out of nine case studies yielded any plausible arguments in favor of the exemptions. Even in those two cases, insurance and agriculture, the actual exemption(s) are seriously dysfunctional. As result, while some focused exemptions might be in order, the existing state of the law is not desirable. For the remaining seven case studies, in my view, no real justification exists for continuing any of those exemptions.

Third, there is no logic to the pattern of existing exemptions. This is best appreciated by looking at Appendix C that has organized the statutory exemptions based on the industry to which they apply. The only consistency that would appear to exist is that some industries have invested in the effort to lobby Congress and have succeeded. Moreover, once on the books, it seems difficult to remove many of these exemptions despite their lack of utility. Only when, as in airline and other transportation services, there is a strong lobby for change, is it likely to

happen.

IV. Comments on Specific Exemptions

The AMC has asked for comments on eight specific statutory exemptions encompassing five industries (ocean shipping, agriculture, foreign trade, insurance, and commercial fishing).

At the outset, it is notable that all of these statutes were originally adopted a number of years ago and except for the Shipping Act have seen few amendments despite the dramatic changes in the industries involved. Most of the other anticompetitive regulatory statutes adopted over the period when these laws were first enacted have been repealed or the administrative agencies enforcing them have moved the industries toward less regulated, more competitive systems. Indeed, this has also occurred in the case of ocean shipping as well. Antiquity is not proof of irrelevance or undesirability, but it is very important to reconsider the merits of such regulation. Two of these areas, fishing and foreign trade, seem largely to have fallen into disuse. The remaining three exemptions have more continuing potential relevance to commerce.

A. Fishing and Foreign Trade

The commercial fishing exemption was largely construed out of existence in the 1950s and appears to be irrelevant. There have emerged, for reasons of resource conservation, other market organizing regulations that seek to limit competition to protect the fisheries.¹³

Based on the reported registrations shown on the FTC web site, it appears that very few American companies currently use the Webb-Pomerene Act provisions. Indeed, if the goal of collective action is to promote efficient global trade through joint ventures to market goods, then

¹³ A recent study of that area is that of Professor Jonathan H. Adler, *Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation*, 61 *Wash. & Lee L. Rev.* 1 (2004).

such conduct is lawful and needs no exemption.¹⁴ Only if competitors affirmatively seek to exploit foreign markets by creating a cartel, would they require an exemption. Given the commitment of this country to global, competitive markets, it is bad international relations and bad substantive public policy to try to protect domestic cartels intended to exploit foreign markets. The limited use of these provisions suggests that they have little or no relevance to contemporary business. Their repeal would eliminate an embarrassing inconsistency in our law.

In short, these two exemptions can and should be repealed. They are statutes that no longer serve (if they ever did) the public interest.

B. Agriculture

There are two types of exemptions represented in the statutes: (1) those that provide some protections for farmer cooperatives as such (Capper-Volstead and sec. 6 of the Clayton Act) and (2) the Agricultural Marketing Agreement Act (AMAA) that authorizes government enforced cartels in the certain agricultural products.

Based on my review of available studies, farm cooperatives as such pose little threat to competition even when they seek primarily to act as pure bargaining agents for farmers (i.e., as a cartel manager). Absent the cartel protecting and empowering provisions of the AMAA, cooperatives have little power to control market prices. Several reasons combine to yield this result. First, the barriers to entry into the production of agricultural commodities are low. Hence, increased prices will and have called forth increased production as a result of both new entry and expanded output by existing producers. Second, a cooperative has different incentives than a conventional profit seeking monopoly. Specifically, a cooperative is usually committed to

¹⁴ The comments of Joint Export Trade Alliance, filed with the AMC on July 15, 2005 in support of retaining the exemptions seem to me to strongly support my conclusion that the statutes are unnecessary for legitimate joint ventures serving international markets.

taking all that its members produce. Hence, it can not very effectively control output and raise prices above a market level. Moreover, even if it imposed limits on its members' production, members could and would resign and, in addition, new producers would enter the market thus overwhelming the efforts of even a monopolist cooperative to control price and output. It is true that some cooperatives have from time to time engaged in coercive and predatory practices in an effort to restrain production. But Capper-Volstead does not shield such conduct from antitrust scrutiny.

Two case studies of major cooperatives provide an empirical basis for the foregoing suggestion. *The Farmer's Benevolent Trust* (1998) by Victoria Saker Woeste is a history of the Sun Maid raisin cooperative showing that after it abandoned illegal coercive practices, it was unable to control the market for raisins until California created a state administered cartel upheld in *Parker v. Brown*, 317 US 341 (1943). *The Sunkist Case A Study in Legal-Economic Analysis* (1987) by Willard F. Mueller, Peter G. Helmberger, and Thomas W. Paterson is study of the California citrus cooperative that concludes that despite authority under the AMAA to regulate marketing, the cooperative was not able to control output or raise prices. In sum, while there are some troubling aspects of the Capper-Volstead Act, it has not and is unlikely in itself to create serious inefficiency.¹⁵

The AMAA on the other hand raises potentially more serious problems for efficiency because this act allows, with the approval of the Secretary of Agriculture, the creation of cartels that can invoke the authority of the United States government to suppress competition and raise

¹⁵ The current ability of cooperatives to merge and to form federations without apparent antitrust oversight (the merger issue is not entirely resolved as a matter of law) and without any public interest review by the Secretary of Agriculture are the most troublesome aspects of the current state of the antitrust exemption with respect to farmer cooperatives.

prices. It appears that for the most part even these government authorized cartels lack significant market power because of the low barriers to entry into both producing agricultural commodities and their processing. However, in some instances, the powers conferred by the AMAA have been used to exploit downstream buyers or interfere with the efficient operation of the market. Last winter, the Florida tomato marketing order organization blocked the sale of a competing tomato that buyers sought because of its better flavor ostensibly because of the unattractive appearance of these tomatoes.¹⁶ This illustrates the problems that the current order system can create. It should also be acknowledged that to the extent that the marketing orders provide quality certification and standardization that benefit both buyers and sellers, they may in fact facilitate efficient market operation rather than frustrate it. Thus, in general, the commodity order system should be modified to remove the ability of such organizations to exclude independent marketing of commodities. This would allow these organizations to continue to provide their market facilitating standard setting services without the risk of exclusionary conduct.

The most serious concerns with respect to market competition and efficiency arise in the dairy markets. Here the order system is most pervasive, serious issues of price manipulation by both buyers and sellers of milk and milk products exist, and some large cooperatives are allegedly exercising the powers conferred by the AMAA to exclude competition and attempt to control the market for fluid (bottled) milk. There is a significant body of scholarly literature debating the costs and benefits of this system.¹⁷

¹⁶Florence Fabricant, Forget About Taste, Florida Says, These Tomatoes Are Just Too Ugly to Ship, *New York Times*, A-13, December 21, 2004.

¹⁷Among the important studies are: David Baumer, Robert Masson, Robin Masson, Curdling the Competition: An Economic and Legal Analysis of the Antitrust Exemption for Agriculture, 31

The fundamental problem is that the methods of protecting the economic interests of dairy farmers were developed long before long distance trucking of milk was feasible and so all milk was used for fluid or other purposes within the local market. It is undoubtedly long past time for Congress to rethink the way in which subsidies for dairy farmers should be collected and distributed. There are, indeed, a number of alternative ways to provide any desired subsidy without the kind of market distorting effects of the present system.

The AMC is not well positioned to propose a comprehensive plan for the reorganization of dairy subsidies. It can, however, point out that the present system both insulates exclusionary and exploitative conduct from appropriate antitrust review and imposes significant costs on consumers that may yield little real gain to the purported beneficiaries—dairy farmers. The goal should be to encourage Congress to revisit the entire system of dairy pricing when it next considers major farm legislation.

C. The Shipping Act

This statute had its origins in a different era. Before the widespread use of containers for general cargo, there may have been some rational basis for a concern with destructive competition because the smallest unit for expanding capacity to serve a market was an entire ship. Moreover, the rest of the world tended, historically, to favor cartels for shipping companies. As a result, the Shipping Act authorized American shipping companies to participate in “conferences” that set rates for service on particular routes. Today the Shipping Act is largely an anachronism that no longer serves well the public interest. The EU has recently issued a report

Villanova L. Rev. 183 (1986); Thomas L. Cox, Jean-Paul Chavas, An Interregional Analysis of Price Discrimination and Domestic Policy Reform in the U.S. Dairy Sector, 83 *Am J. Of Ag. Econ.* 89 (2001); and P. A. Ippolito, R. T. Masson, The Social Cost of Government Regulation of Milk, 10 *J. L. & Econ.* 33 (1978).

that is highly critical of the liner industry, and the OECD has also published a critical study. OECD Competition Policy in Liner Shipping Final Report DSTI/DOT(2002)2 (2002).

The most recent revisions of the Shipping Act authorized conference members to enter into contracts for rates other than conference rates and protected them from retaliation. As result, today, the vast bulk of general cargo moves outside the conference system at privately negotiated rates. The estimates are that as much as 80% or 90% of the cargo on major routes is now outside the conference system. There seems no justification to retain the general exemption for shipping companies that want to enter into cartels.¹⁸

In examining this topic, it has seemed to me that shippers have two concerns that might be worth further consideration in the context of repealing the existing exemption. To the extent that the exemption system allows shipping companies to enter into legitimate joint ventures to share capacity and thus achieve efficiency without concern for antitrust liability, removing the exemption may increase some of the risks associated with such ventures. The other concern is with information sharing on the coordination of ship schedules. Both of these activities can, if legitimate, get business review clearances through the Justice Department. Although not the same as full exemptions, such clearances should provide significant reassurance that the proposed course of conduct is lawful. However, the AMC may want to consider whether the current procedures for considering and granting such reviews provide sufficient opportunity for other stake holders to have an effective voice in the review process and whether any need exists to reduce further any of residual risks of antitrust liability.

¹⁸ As shown in Appendix C, there is a cluster of exemptions involving transportation. These are largely residual elements of broader regulatory schemes that Congress has repealed. The AMC should consider suggesting to Congress that it do a review of all transportation industry exemptions and create a unified policy in the area with respect to both agency supervision and the application of antitrust law.

D. McCarran-Ferguson (Insurance)

This statute rests on a set of assumptions dating from the mid-1940s about the negative implications of competition for the public interest in insurance that have long since been disproved. Although the antitrust exemption applies to the business of insurance generally, the real concern was to protect rate setting and policy term agreements in property and casualty insurance. It is now clear that rate setting agreements are not necessary to solvency and for most lines of insurance in most states, competition has been the norm for some time. It is helpful to have common terms for policies, but this is a conventional regulatory process in which state action and the *Noerr-Pennington* doctrines provide insulation. Hence, the rationales for a broad antitrust exemption for insurance have long been discredited.

There are some special considerations related to information pooling and analysis in the property and casualty insurance business that can raise antitrust concerns. There are both economies of scale and scope in pooling data on losses over extended periods of time and doing a consolidated analysis of that data to project trends for losses. The ABA more than 15 years ago (Resolution adopted at the 1989 Mid-Year Convention) recommended elimination of the general exemption but also suggested that the law continue to provide a safe harbor for legitimate and reasonable information pooling and analysis that served the public interest. Nothing in the intervening years makes that recommendation any less relevant today.

V. Conclusion

The AMC deserves great credit for focusing attention on the ad hoc process of antitrust exemptions. I hope that it will strongly encourage Congress to reduce or eliminate those that lack adequate justification.

COMPETITION POLICY AND MERGER ANALYSIS IN DEREGULATED AND NEWLY COMPETITIVE INDUSTRIES

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Appendix B

Statutory Exemptions from Antitrust Law (preliminary title)

A monograph under development for the Antitrust Section of the ABA, projected publication, 2006. Peter Carstensen, Christopher Sagers Co-Chairs of the Drafting Committee

I. Overview

Chapter 1. Introduction

Chapter 2. Overview of Statutory Exemptions

Chapter 3. Economic Analysis and Statutory Exemptions

II. Pervasive Statutory Exemptions

Chapter 4. Agriculture

Chapter 5. Insurance

Chapter 6. Ocean Shipping

III. Focused Statutory Exemptions

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Chapter 9. Newspaper Joint Ventures

IV. Modifications of Antitrust

Chapter 10. Collective Research, Production, and Standard Setting Activities

Chapter 11. Soft Drink Bottling and Distribution

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V. Conclusion

Chapter 13. Conclusions

Appendix C

List of Statutory Provisions Creating Exemptions from or Modifications of Antitrust Law by Industry

1. Insurance:

- a. *McCarran Ferguson Act, 15 USC 1012 et seq.*
- b. Merchant Marine Act of 1920, 46 USC app. 876(1)(b).

2. Commercial transportation:

- a. Ocean Shipping: *The Shipping Act, 46 USC app. 1701-1721.*
- b. Railroads: *Surface Transportation Act, 49 USC 701 et seq.*
- c. Commercial airlines: *International air carrier agreement exemptions, 49 USC 41308, 41309, 42111*
- d. Trucking, 49 USC 13703
- e. Interstate bus mergers, 49 USC 14303
- f. Airport congestion, 49 USC 40129

3. Agriculture:

- a. *Capper-Volstead Act, 7 USC 29 et seq.*
- b. *Section 6 of the Clayton Act (15 USC 17),*
- c. *Agricultural Marketing Agreement Act, 7 USC 608b.*
- d. Robinson-Patman Act 15 USC 13b
- e. Hog cholera: *Anti-Hog Cholera Serum Act, 7 USC 852.*

4. Commercial fishing: *The Fishermen's Collective Marketing Act, 15 USC 521.*

5. Labor:

- a. *Clayton Act Sections 6 and 20, 15 USC 17,*
- b. *Norris-LaGuardia Act, 29 USC 101-113.*

6. Energy:

- a. *Natural Gas Policy Act of 1978 as modified by the Natural Gas Wellhead Decontrol Act of 1989, 16 USC 3364(e).*
- b. Wholesale electric power, 16 USC 824k(e)(1) (per District Court opinion)

7. Foreign commerce:

- a. *Webb-Pomerene Export Act, 15 USC 61 et seq.,*
- b. *Export Trading Company Act, 15 USC 4001.*

8. Defense: *Defense Production Act, 50 USC app. 2061 et seq.*

9. Professional sports: *Sports Broadcasting Act and Professional Football League Merger Act, 15 USC 1291 et seq.*

10. Charitable annuities: *Charitable Gift Annuity Antitrust Relief Act of 1995, 15 USC 37.*
11. Education:
 - a. College financial aid: *Need Based Financial Aid Act, 15 USC 1 note.*
 - b. Graduate medical resident programs, 15 USC 37b.
12. Newspapers: *Newspaper Preservation Act, 15 USC 1801 et seq.*
13. Soft drinks: *Soft Drink Interbrand Competition Act, 15 USC 3501.*
14. Bank mergers: *Bank Merger Act and Bank Holding Company Act, 12 USC 1828(c); 1849(b).*
15. Cooperative Activities (research, production, standard setting):
 - a. *National Cooperative Research and Production Act 15 USC 4301 et seq.*
 - b. Standards Development Organization Advancements Act, amending 15 USC 4301 et seq.
16. Health care: *Health Care Quality Improvement Act (42 USC 11111).*
17. Local government: *Local Government Antitrust Act, 15 USC 34.*
18. Small business research and development joint ventures: 16 USC 638(d).
19. Television broadcasting with respect to violence on TV: 47 USC 303c(c).